UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 443

Cases Nos. 470: SARABIA
473: DE CASTRO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-President, presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, on 18 March 1988, Maria Rosa Sarabia and Maria Elena de Castro, staff members of the United Nations, filed applications which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicants, after making the necessary corrections, filed two identifical applications on 22 July 1988;

Whereas in their applications, the Applicants requested the Tribunal:

"To rule in favour of [their] application[s], by requesting the Secretary-General of the United Nations

(a) To pay the portion of the daily subsistence allowance remaining unpaid;

(b) To take steps to ensure that in future no personal discrimination against staff members on mission will be possible, especially as regards the daily subsistence allowance, and that the dignity of staff members will be scrupulously respected in all circumstances".

Whereas, with the agreement of the President of the Tribunal, the Respondent filed a single answer on 15 November 1988;

Whereas the facts in the two cases are as follows:

The Applicants, typists in the Spanish Typing Unit at the United Nations Office at Geneva, were assigned on mission to the sixth session of the Commission on Human Settlements, which was to be held at Helsinki (Finland) from 26 April to 6 May 1983. On 18 March 1983, the Chief of Conference Services sent to the staff members assigned to this mission a circular informing them, among other things, that the daily subsistence allowance for Helsinki was then 366 markkaa, the exchange rate being 5.40 markkaa to one United States dollar. On 12 April 1983, she informed them by another circular that New York had authorized a special daily subsistence allowance rate of 500 markkaa for the duration of the mission, but that that rate would not apply in cases where staff members shared a room. On 14 April 1983, some 20 staff members, including the two Applicants, sent the Chief of Conference Services the following protest:

> "We have just received Information Circular No. 2 and wish to call your attention to the fact that sharing a room and receiving a lower perdiem is unfair because, as you will see from the table below, a person not sharing a room would be left with more money on balance (average price quoted):
>
> | Single room (Hotel Helka) | | Room shared (Hotel Helka) | |
> |---|---|---|---|
> | Perdiem | 500 | Perdiem | 366 |
> | Hotel | 194 | Hotel | 135 |
> | Balance | 306 | Balance | 231 |
>
> Therefore, had we known these facts in advance, we would not have requested sharing a room. It might be too late to change our reservations but we hope that, in the light of the above, a reversal of this decision will be taken."

On 22 April 1983, the Chief of Conference Services sent to the staff members assigned to the mission, from Helsinki, a third circular giving details concerning the method of payment of the allowance; the two rates were mentioned in that circular. On 6 May 1983, in a memorandum sent from Helsinki to the Office of Financial Services at Headquarters, the staff members concerned again protested the fact that two different daily subsistence allowance rates were being applied to staff members assigned to the same conference:

"2. The DSA [daily subsistence allowance] rate originally applied (FIM 366) was barely sufficient to pay the cost of a single room at the better hotels in Helsinki, which was why some staff members felt obliged to share a room, when in other circumstances they would not have done so. However, when, as was inevitable, the DSA rate was raised by over 30 per cent, staff members assigned to the conference were informed of this measure only three days before departure, by which time all hotel reservations had been made through the official agency.

3. The rate of a subsistence allowance is calculated by the cost of living and current prices at the duty station and not by the expenses individual staff members wish to make. Staff members may dispose freely of the allowance to which they are entitled, and this must apply equally to the choice of accommodation. Moreover, the calculation of the DSA takes into account not only cost of accommodation but also daily current expenses of staff members which - as opposed to hotel rooms - are not shareable.

4. The undersigned members of the secretariat strongly protest against this decision and request that - as is customary - the same DSA rate be applied to all staff members without discrimination. Upon our return to Geneva, we will be submitting our travel claims in accordance with this request, i.e. that the DSA rate of $90 a day - instead of $68 - be applied."

On 23 May 1983, the Office of Financial Services addressed the following reply to the Administration and to the Staff Committee of the United Nations Office at Geneva:

"1. DSA rates are established by the International Civil Service Commission on the basis of the latest information available to it on room and meal costs of good commercial hotels and restaurants in the particular locality and that these rates are applied by all organizations of the UN system. Under very specific circumstances, ad hoc DSA rates can be established by our office. We do so in cases where there are truly compelling circumstances for individual staff members or groups of staff to stay at hotels where rates are such that the applicable DSA rate would not be adequate to cover the expenses involved. In such cases, we attempt to cover actual expenses incurred. Thus, our approach can be assimilated somewhat to what is known as 'expense account'.

2. In the case of Helsinki, information was requested and provided regarding room and meal costs at the hotels where staff were to be staying, some six weeks prior to the beginning of the conference. On that basis, a special DSA rate of 500 Markka was established with the stipulation that this rate would not be subject to any supplement (15 or 40 per cent), nor would it apply in cases where staff were sharing a room. Both exclusions are standard when an ad hoc rate is authorized. In such cases, there is no need for a 15 or 40 per cent premium as the

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rate reflects actual costs incurred and insofar as sharing is concerned, one half of the room cost of double occupancy is sizeably less than the cost of a single room and usually such room cost is in line with the regular DSA rate.

3. Based on information provided, room cost used by our office in establishing the special DSA rate was 275 Markka. Thus, staff members receiving the special DSA rate of 500 Markka had 225 Markka to cover meals and other incidentals. A staff member sharing a room and receiving the regular DSA rate of 366 Markka who would pay some 150 Markka towards the cost of the room would still have 216 Markka left to cover meals and incidentals. Viewed in this light, we believe that the staff members who shared and received the regular rate of DSA for Helsinki were not put in an 'out-of-pocket' situation and thus find no reason to authorize them to receive the special rate.

4. If however, staff members concerned can provide substantiating evidence in the form of hotel bills and other receipts proving that they were out-of-pocket, even though they shared a room while attending the conference in Helsinki, we would be prepared to examine each individual case on its own merit."

On 31 January 1984, the Applicants requested the Secretary-General to review the decision of the Office of Financial Services not to pay the official adjusted daily subsistence allowance rate to those staff members attending the Helsinki session who had shared hotel accommodations. Having been informed on 9 March 1984, by the Deputy Controller that the Secretary-General would not be able to accede to their request, the Applicants lodged an appeal to the Joint Appeals Board at Geneva on 21 August 1984. The Board adopted its report on 20 August 1987. Concerning the merits of the appeal, the Board concluded:

"While the grievances expressed by Appellants are understandable, they did not demonstrate that they suffered financial hardship during the official mission. Although the Board understands very well that they experienced unnecessary discomfort and inconvenience, it does not make a recommendation to the Secretary-General to recompense them financially ex post facto."

On 7 January 1988, the Assistant Secretary-General for Human Resources Management informed the Applicants that the Secretary-General, having re-examined their case in the light of the Board's report, had decided to maintain the contested decision. On 18 March 1988, the Applicants filed the applications mentioned above.

Whereas the Applicants' principal contentions are:

1. Staff rules 107.15 and 107.16 do not provide for differential treatment of staff members assigned to the same mission.

2. The discrimination against the Applicants creates an unacceptable precedent by making it possible for the Administration to scrutinize the personal aspects of the use of the allowance, a practice not permitted by the Staff Rules. The rate of the allowance should therefore be established and paid uniformly for each duty station in the light of the standard subsistence allowance accepted by the Administration, irrespective of staff members' preferences with regard to accommodation and meals.

3. The decision contested by the Applicants was taken in 1983, on the basis of a new interpretation - erroneous and highly questionable - of the procedures for the application of special subsistence allowance rates which were not communicated to the Consultative Committee on Administrative Questions (CCAQ) until January 1986, and moreover were not discussed beforehand with the staff representatives, as envisaged by the Staff Rules and customary practice.

Whereas the Respondent's principal contentions are:

1. The Secretary-General was not required to apply the special daily subsistence allowance rate to all staff members on mission in Helsinki for the sixth session of the Commission on Human Settlements and, in particular, to apply the said special rate to the Applicants.

2. The Secretary-General was not required to discuss the establishment of the special daily subsistence allowance rate with the staff representatives.

3. The fact that CCAQ was informed of the procedures for the establishment and application of the special daily subsistence allowance rate in 1986 does not affect the validity of the contested decision.

4. Contrary to their assertions, the Applicants were informed in advance both of the establishment of the special daily subsistence allowance rate and of the conditions for its application.

The Tribunal, having deliberated from 11 to 22 May 1989, now pronounces the following judgement:

I. Since the applications filed by the two Applicants are identical, the Tribunal orders the joinder of the two cases.

II. The Applicants request the Tribunal to decide that the Secretary-General should "take steps to ensure that in future no personal discrimination against staff members on mission will be possible, especially as regards the daily subsistence allowance, and that the dignity of staff members will be scrupulously respected in all circumstances".

Under its Statute, the Tribunal is not empowered to address injunctions to the Secretary-General and order him to take general measures. Under article 2.1 of its Statute, the Tribunal is only "competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members". It would therefore be exceeding its jurisdiction and competence if it ruled on the aforementioned request of the Applicants.

III. On the other hand, the Tribunal is competent to rule on the request of the Applicants - typists working in Geneva and assigned to the sixth session of the Commission on Human Settlements, held at Helsinki from 26 April to 6 May 1983 - to be paid the portion of the daily subsistence allowance which, allegedly, was not paid to them.

IV. The Applicants do not contest that at the time in question the daily allowance was 366 markkaa, as indicated in the circular of 18 May 1983. They contend that the decision announced in the circular of 12 April 1983, raising the allowance to the special rate of 500 markkaa for the duration of the sixth session of the Commission on Human Settlements in Helsinki should have been applied to them. This decision set one condition for the granting of the special rate: staff members must not be sharing a room.

V. In the circular of 18 March 1983, the Applicants were asked to complete a form concerning their requests for hotel reservations at Helsinki. In the event that they preferred to make their own arrangements, they were asked to complete the form but to indicate "no hotel reservation required".

VI. Before the issuance of the circular of 12 April 1983, the Applicants had, in accordance with the instructions received and in the light of the very high cost of rooms, reserved a double room at the Hotel Helka through the Chief of Conference Services. They thus shared a room.

VII. The staff members to whom the circular of 12 April 1983 was applied contested the condition preventing those sharing a room from receiving the 500 markkaa allowance. They emphasized that in the case of staff members staying at the same hotel, those sharing a room would, once the price of the room was deducted, receive 75 markkaa less than staff members occupying a single room.

Of course, as the staff members pointed out, if they had known about that situation when making their official reservations, they would naturally have requested single rooms.

VIII. The Applicants did, in fact, seek to change their reservations but it was too late. The Joint Appeals Board confirmed that fact in its report:

> "24. ... the fact remains that information in this respect reached the Appellants (and their colleagues) too late for them to change their hotel reservations. These had been made, well in advance, in accordance with the normal procedures. At the time of booking, the Appellants had decided to share a room in order to avoid being out of pocket at the standard DSA rate of which they had been informed at that time (366 markkaa). They testified that as soon as they received the memorandum concerning the decision to grant an ad hoc DSA, they contacted the hotel immediately by telephone in an attempt to obtain single rooms, but that the hotel was unable to meet their request."

The Respondent has not contested the testimony of the Applicants on that specific point. He merely states that the Applicants were indeed informed of the new arrangements on 12 April 1983.

That is true, but the Applicants had made their official reservations at the appropriate time. As soon as they received the circular of 12 April 1983,

almost one month later, they had sought in vain to reserve single rooms. Even after their arrival in Helsinki, they were unable to do so.

IX. By a communication of 9 March 1984, the Deputy Controller, while refusing to grant the Applicants the special rate, nevertheless offered them the concession provided for in the memorandum of 23 May 1983, from the Office of Financial Services:

> "8. If you can provide documented evidence in the form of paid hotel bills and other receipts for each person showing that you were 'out-of-pocket' under the standard DSA rate of 366 markkaa, even if you shared a room, we would be prepared to review your cases ... Otherwise, you are entitled only to the standard DSA rate."

The Applicants did not submit the requested documents to the Respondent.

X. The Tribunal finds that the Applicants did, in any event, sustain injury. As the Respondent acknowledges, if they had occupied single rooms that would have been left with 306 markkaa after paying the hotel, but in sharing a room, they were left with only 231 markkaa.

Furthermore, as the Joint Appeals Board indicates, the Applicants certainly suffered the discomfort and inconvenience of being obliged to share a room under the stressful conditions of a fairly long conference.

XI. By requesting the Applicants to provide documented evidence of their actual expenditures in the form of paid hotel bills and other receipts, while other staff members, who were receiving the special 500 markkaa subsistence allowance, did not have to substantiate their expenditures, the Respondent infringed upon the principle of the equality of staff members in the same category, applied by the Tribunal. He thereby in fact introduced unjustifiable discrimination among those staff members.

XII. The Tribunal does not question the powers of the Secretary-General to define the conditions for the granting of a special subsistence allowance. Furthermore, it finds no procedural irregularity in the establishment of that allowance.

XIII. On the other hand, the Tribunal considers that the Applicants were not in a position to make a timely choice between a shared room and a single room. It considers that as a result of the conduct of the Administration, the Applicants sustained an injury for which the latter must make compensation.

XIV. Lastly, the Tribunal considers that the compensation offered to the Applicants in the form of reimbursement - if they could prove that they had spent more than the normal subsistence allowance - was not acceptable. It infringed the principle of equality mentioned above.

XV. The Tribunal considers that the injury sustained by each of the Applicants is equal to the difference between the amount of the daily subsistence allowance they received and of the special allowance they should have received, like their colleagues assigned to the same mission.

XVI. For the foregoing reasons, the Tribunal:

(a) Orders the payment to each of the Applicants, at the exchange rate applicable by the United Nations at the time, of an amount equal to the difference between the daily subsistence allowance which they received and that which they would have received if the special rate of 500 markkaa had been applied to them;

(b) Rejects all other pleas of the Applicants.

Signatures

Roger PINTO
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

Geneva, 22 May 1989

Jean Hardy
Acting Executive Secretary

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